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No. 94-1401

In the Supreme Court of the United States

OCTOBER TERM, 1994

STEVE NAKAMURA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to invoke its supervisory power to require a hearing prior to the disclosure of certain subpoenaed material to a grand jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 40 F.3d 1096. The opinion of the district court (Pet. App. 22-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1994. The petition for a writ of certiorari was filed on February 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This matter arose out of a federal grand jury investigation into the fatal shooting of Peter Klunck by Albuquerque police officers on January 27, 1989.

Following the shooting, the Internal Affairs Unit (IAU) of the Albuquerque Police Department (the Department) conducted an investigation in which it interviewed officers present during the attempt to apprehend Mr. Klunck, including petitioners. Department regulations require officers, as a condition of continuing employment, to answer truthfully all questions relating to matters under IAU investigation. Pet. App. 2-3. The regulations further provide that an officer's answers to such questions "shall [not] be the basis for an individual waiving his Fifth Amendment rights under the Constitution or law of the United States of America or the State of New Mexico." *Ibid.*

2. In 1992, the Federal Bureau of Investigation began an investigation into the shooting of Mr. Klunck to determine whether the shooting violated Mr. Klunck's federal civil rights. As part of its investigation, the FBI requested the Department's IAU investigation file from Department Chief Bob Stover. Chief Stover refused to provide the file, asserting that the officers' compelled statements were not subject to disclosure. C.A. App. 15; Pet. App. 4.

3. On December 7, 1993, a federal grand jury in Albuquerque investigating the shooting of Mr. Klunck served on Chief Stover a subpoena duces tecum requesting a copy of the IAU report. Pet. App. 4. On December 27, 1993, Chief Stover filed a motion to quash or modify the subpoena, arguing that, because the officers' statements were compelled under threat of termination, this Court's decision in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), precluded their use in a subsequent criminal proceeding. Gov't C.A. Br. 3; Pet. App. 4.

4. On January 7, 1994, after viewing the IAU report *in camera*, the district court denied Chief Stover's

motion to quash the subpoena and ordered that the subpoenaed material be turned over to the Assistant United States Attorney with directions that the documents not be disclosed except to those persons authorized to receive grand jury material under Federal Rule of Criminal Procedure 6.[1] Pet. App. 4. Chief Stover filed a motion to stay the order. *Ibid.*

5. On January 11, 1994, petitioner Steve Nakamura, one of the police officers who gave statements to the IAU investigators, moved to intervene and for a stay and reconsideration of the court's January 7, 1994, order. The same day, five unnamed members of the Department who had given IAU statements, also petitioners here, separately filed a "Motion for Intervention, Stay of Order and Reconsideration." Pet. App. 3-5.

6. The district court denied Chief Stover's motion for a stay and, on January 12, 1994, denied petitioners' consolidated motions. Pet. App. 22-26. The district court rejected the contention that *Garrity* precluded disclosure of the IAU report to the grand jury. The court found that the officers "are immunized insofar as the use of the compelled statements," and that "[t]here are sufficient protections under *Garrity* and its progeny * * * to preclude the use of compelled statements against the declarant." *Id.* at 24. The court dismissed as unsupported petitioners' contention that the material might be used in future civil litigation, and noted that,

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[1] Federal Rule of Criminal Procedure 6(e)(3)(A) allows disclosure of matters occurring before the grand jury to government attorneys for use in the performance of their duties, and "such government personnel * * * as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

pursuant to Federal Rule of Criminal Procedure 6, "the Court is sufficiently empowered to punish those violating the confidentiality of grand jury proceedings and to protect the constitutional rights of those wronged." Pet. App. 25.

7. The court of appeals affirmed the district court's refusal to quash the subpoena.[2] Pet. App. 1-21. The court first determined that, although the denial of a motion to quash a subpoena is interlocutory in nature, the district court's order was immediately appealable under *Perlman* v. *United States*, 247 U.S. 7 (1918), because Chief Stover had informed petitioners that he intended to turn the internal affairs file over to the grand jury rather than await a contempt citation. Pet. App. 7-8.

The court rejected the government's contention that the case had become moot because the IAU file had in fact been turned over to the grand jury. Relying on this Court's decision in *Church of Scientology* v. *United States*, 113 S. Ct. 447 (1992), the court of appeals determined that it could still afford petitioners the relief they sought by ordering that the IAU report be returned to the Department or destroyed. Pet. App. 8-9.

Turning to the merits, the court of appeals rejected petitioners' contention that mere disclosure of the IAU file to the grand jury violated their Fifth Amendment right against self-incrimination. The court noted that no officer was required to waive his Fifth Amendment privilege in responding to the IAU investigators' inquiries, and that the grand jury had not yet returned an indictment against any officer whose compelled

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[2] Observing that persons in petitioners' position "generally have the right to intervene in a pending criminal matter" (Pet. App. 5 n.1), the court of appeals proceeded to "consider the substantive bases of the [district] court's denial of [petitioners'] motions." *Ibid.*

statement had been disclosed. Pet. App. 14-16. Consequently, the court held, the officers' statements to the IAU had not been obtained or used in violation of the Constitution. *Ibid.*

Finding petitioners' concerns of potential grand jury abuse to be purely speculative, the court asserted that, if and when the grand jury returned an indictment against any of the petitioners, each indicted officer would be entitled to challenge his indictment in a hearing of the kind prescribed by this Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972). Pet. App. 17. The court of appeals observed that in such a hearing, "the government will be required to prove that its evidence derives entirely from legitimate sources or that the grand jury's exposure to the officer's statement was harmless." *Ibid.* The court concluded that the right to a *Kastigar*-style hearing, along with the procedural protections employed by the government, "provides an adequate safeguard against violation of [petitioners'] Fifth Amendment rights." *Id.* at 18-19.

Finally, the court rejected petitioners' argument that, even if disclosure of the IAU file to the grand jury was not a per se violation of the Fifth Amendment, the court was obliged to require a pre-disclosure hearing at which the government would be required to demonstrate, *inter alia*, a "compelling need" for the subpoenaed material. Pet. App. 19-20. The court declined to add this "additional layer of protection" requested by petitioners, in light of its finding that existing protections were adequate. *Id.* at 20-21.

8. In November, 1994, the Albuquerque grand jury's tenure expired. The grand jury did not issue any indictments, and no subsequent grand jury investigation regarding the Klunck shooting is likely. Petitioners

filed their petition for a writ of certiorari on February 17, 1995, after the expiration of the grand jury.

ARGUMENT

1. Petitioners seek review of the court of appeals' refusal to impose additional conditions on the grand jury's use of the IAU file, and request that this Court impose an elaborate pre-disclosure hearing requirement. *E.g.*, Pet. 16, 18, 27. However, the grand jury's term has expired and the jurors have been dismissed. This Court cannot, therefore, grant the relief petitioners seek, and the case is moot. *Preiser* v. *Newkirk*, 422 U.S. 395, 401-402 (1975); see also *In re Grand Jury Proceedings* (*Jane Doe*), 863 F.2d 667, 668 (9th Cir. 1988) (appeal of finding of civil contempt for refusing to testify before grand jury was moot where term of grand jury had lapsed); *In re Grand Jury Proceedings* (*Larson*), 785 F.2d 629 (8th Cir. 1986) (same).[3]

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[3] Applying this Court's decision in *Church of Scientology* v. *United States*, 113 S. Ct. 447 (1992), the court of appeals concluded that, although the IAU file had already been turned over to the grand jury, the case was not then moot because the district court could order the grand jury to return or destroy the IAU file. Pet. App. 9. At present, however, the grand jury no longer exists and the relief that petitioners sought below cannot be granted. Additionally, the prophylactic procedural mechanism that petitioners seek in this Court (Pet. 27) cannot be provided in the absence of an ongoing grand jury investigation.

This outcome is consistent with *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983). In *Sells*, the Court found a live controversy to exist, despite prior disclosure of grand jury materials to the government, where the government sought the materials "for use in preparing and conducting a possible civil suit against respondents under the False Claims Act." *Id.* at 421-422 & n.6. In the instant case, the IAU file was sought solely for use in the grand jury's now-terminated investigation.

This case does not fall within the exception to the mootness doctrine afforded to disputes that are "capable of repetition, yet evading review." See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The grand jury at issue in this case has concluded its investigation without issuing an indictment, and there is no reasonable likelihood that a subsequent grand jury will be called to investigate the Klunck shooting. Thus, there is no "reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). See *In re Federal Grand Jury Proceedings, 89-10 (MIA)*, 938 F.2d 1578, 1580 (11th Cir. 1991) (speculation that issue might recur in a subsequent proceeding not sufficient to invoke exception to mootness doctrine); *In re Grand Jury Proceedings (Larson)*, 785 F.2d at 631 (issue not "capable of repetition, yet evading review" where no "reasonable expectation exists that [the appellant] will again be subpoenaed to testify about [the target of the investigation]").

Both courts below concluded that disclosure of the IAU file did not violate the Fifth Amendment. The court of appeals also rejected petitioners' contention that additional procedural protections were necessary. As we show below, those determinations would not warrant this Court's review in the absence of a suggestion of mootness. In such circumstances, the fact that the controversy has become moot does not provide a reason for the Court to disturb the judgment of the court of appeals. *Dove* v. *United States*, 423 U.S. 325 (1976) (per curiam).[4]

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[4] We have consistently taken the position that the Court should deny review of cases that have become moot while a petition for

2. Petitioners do not now appear to challenge the court of appeals' decision that disclosure of the IAU file to the grand jury did not violate the Fifth Amendment under *Garrity* and its progeny. Rather, they urge this Court "to revisit *Garrity* and establish procedural safeguards for use by district courts where a grand jury subpoena requests full and unsupervised disclosure of police officers' Internal Affairs statements." Pet. 12.[5]

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certiorari is pending but has not yet been granted, when such cases do not present any question that is independently worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900) (arguing that Court should deny certiorari in moot cases that would not have warranted review on the merits); Robert L. Stern et al., *Supreme Court Practice* § 18.5, at 724 n.29 (7th ed. 1993) (discussing *Velsicol* doctrine and stating that the Court appears to follow the argument advanced in the U.S. brief in that case); but see 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.10, at 432-435 (2d ed. 1984 & Supp. 1994) (disapproving *Velsicol* doctrine and stating that vacatur under *Munsingwear* is always appropriate when case becomes moot before Court grants certiorari). Petitioners have been provided a copy of the United States' Briefs in Opposition in *Velsicol*.

[5] To the extent that this request encompasses a contention that disclosure of the IAU file violated the Fifth Amendment, that contention is without merit. The court of appeals correctly determined (Pet. App. 16-17) that it is not the mere disclosure of compelled statements that implicates the Fifth Amendment right against self-incrimination, but the use of such statements to prosecute a particular declarant. See, *e.g.*, *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968) (Fifth Amendment would not be violated where an officer is compelled to answer questions relating to his duties but is not required to waive his immunity with respect to the use of his answers); *Lefkowitz* v. *Turley*, 414 U.S. 70, 84 (1973) (same). A contrary result would, for example, invalidate the use of an internal affairs report to indict someone other than the declarant, although no Fifth Amendment right would be implicated by such use.

The court of appeals correctly held that existing restrictions on the use of grand jury material are adequate to safeguard officers' Fifth Amendment rights.

The court of appeals found (Pet. App. 18-19) that the availability of a post-indictment hearing of the kind prescribed by this Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972), adequately protects the Fifth Amendment right recognized in *Garrity*. Under *Kastigar*, when a defendant is indicted after making a compelled statement, the government has the burden of demonstrating "an independent, legitimate source for the disputed evidence." *Id.* at 460 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 n.18 (1964)). Where, as here, the grand jury does not return an indictment against the declarant, no Fifth Amendment right is implicated and a hearing is unnecessary.

The courts have encountered no difficulty in applying *Kastigar*'s hearing requirements to protect the rights identified in *Garrity*. See, *e.g.*, *In re Grand Jury Proceedings*, 45 F.3d 343, 348 (9th Cir. 1995); *United States* v. *Koon*, 34 F.3d 1416, 1431 (9th Cir. 1994), petitions for cert. pending, Nos. 94-1664 (filed Apr. 10, 1995) & 94-8842 (filed Apr. 12, 1995). Petitioners have identified no conflict in the courts of appeals on this issue or any case in which protection through a *Kastigar* hearing has been found to be inadequate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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